JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1969

No. 281

JOHN J. TYNE, JR.

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

THOMAS J. CARLEY
Attorney for Petitioner
159 Princeton Road
Rockville Centre, N. Y. 11570
516 RO 6-2489

IN THE

Supreme Court of the United States

October Term, 1969

No. 281

JOHN J. TYNE, JR.

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Preliminary Statement

The judgment of the Court of Appeals was entered on April 2, 1969. Taxpayer's petition for a writ of certiorari was docketed on June 25, 1969. Respondent was served and actually received five copies of taxpayer's petition on the same June 25, 1969. Respondent had until July 1, 1969 to file a petition or cross-petition for certiorari, which he declined to do. Pursuant to Rule 24, ¶1 of the Rules of the Court, respondent had until July 25, 1969 to file a brief in opposition, which he also did not do. The Court may notice that respondent filed his brief in this matter after all deadlines spelled out in the Rules of the Court.

Argument

1. Respondent attempts on Page 2 of his brief to distort the first of the 3 questions presented by petitioner. Immediately, respondent indicates the legal chaos which exists in this area of law. No question is presented as regards a situation where taxpayer would not have used his vehicle but for the necessity of transporting tools; that question has consistently been held by the Second, Seventh and Ninth Circuits to give rise to 100% deductibility of the expenses involved. The first question presented by petitioner concerns a situation where it may be found that taxpayer *would* have driven to and from work had it not been necessary to transport his tools. Respondent chose not to petition for a writ of certiorari and he cannot now do by indirection what he previously chose not to do directly. He does, however, emphasize the grave need for this Court to hear the questions presented by petitioner.

2. Petitioner's questions 2 and 3 are completely avoided by respondent. No argument is presented by respondent. Respondent does state in ¶3 on Page 5 of his brief: "a refund has already been made". If this quoted statement is intended to be fully informative, we must report to this Court that it is not. Of the total seizure of $2,020.22, a partial refund was made after petitioner instituted proceedings for refund of the seizures. Of the seized amount, the refund made in May 1969 totaled $488.93. Respondent still retains the balance of the seizure in the amount of $1,531.29. We are grieved that respondent failed to state the matter fully. But more importantly, respondent, by not addressing himself to petitioner's Questions 2 and 3, emphasizes the grave need for this Court to hear the questions presented.

3. Respondent mis-states the matter when, in the parenthetic notation of the expenses involved at the bottom

of Page 2 of his brief, he uses the word "assertedly". There is nothing *assertedly* about the matter. These are the exact expenses to which all the random percentages have been applied, both by the Tax Court and by respondent as he admits on the bottom of Page 3 of his brief: "the Commissioner made a fifty percent allocation of expenses". The expenses used by the Commissioner were the precise amounts set forth which respondent now tries to conceal as *assertedly* on Page 2 but which he admits as accurate on Page 3 of his brief, in his computations to the Tax Court, and elsewhere.

4. Respondent highlights the importance of this case and urgent need for this Court to decide the issue when he creates his own new rule and baldly states:

> "If petitioner would have driven to work regardless of the need for transporting tools, his driving expenses were personal commuting expenses, and there would be no basis for any deduction."

Thus, in one stroke he attempts to overrule all decisions in point by the Second, Seventh and Ninth Circuit Courts of Appeal. In the same stroke he also re-writes Section 162 (a) of the Internal Revenue Code by announcing there shall NOT be allowed all the ordinary and necessary expenses paid or incurred in carrying on any trade or business.

In support of the new rule he created for this case, respondent cites *U. S.* v. *Correll,* 389 U. S. 299, 303 which most certainly is inapplicable to the case at bar. *Correll* concerned the deductibility of morning and noon meals of a travelling salesman. This Court, in *Correll,* ruled that the word *and* in the statute there involved really meant *and* because that was the word used by Congress in the statute. This Court thus ruled in *Correll* that the phrase "meals *and* lodging" was a conjunctive phrase because the conjunctive word *and* was used in the statute. *Correll* is very dam-

aging to respondent because it shows that the wording of the statute must be followed. This being so, it is clear that the word "ALL" in Section 162 (a) cannot be read to say "some" or "none" . . : for if the wording of a statute is determinative in one case, the wording of a different statute in a different case has also to be determinative. It is also clear that the meaning of the word "ALL" in Section 162 (a) must of necessity have the same meaning in Section 61 (a) of the Internal Revenue Code of 1954.

5. Respondent continues:

> "On the other hand, if the Tax Court on remand should find that petitioner would not have driven to work but for the necessity of carrying his tools (Rev. Rul. 63-100, 1963-1 Cum. Bull. 34), he may be entitled to a greater deduction for the transportation expenses. Absent such a finding, however, there is nothing to justify a larger deduction than the 50 percent allocation made by the Commissioner and adopted by the Tax Court. The decision may well be generous, for it is not clear that moving tools from home to job is any less a commuting expense than is the cost of moving the taxpayer himself."

The Seventh Circuit assigned the burden to the Commissioner to justify less than 100% of Tyne's expenses which, of course, respondent did not do. Respondent claims the matter is not clear to him and thus provides a pursuasive reason why the Court should hear this case.

Respondent relies on his etherial and consistently discredited Rev. Rul. 63-100 and in so doing greatly enhances the need for this cause to be heard and determined by this Court. Respondent states that petitioner "may" be entitled to a greater deduction. Thus we are permitted to tell this Court how respondent is using his discredited Rev. Rul. 63-100 in daily practice. Respondent construes

the first paragraph of his Ruling as spelling out "absolute necessity" of vehicular transportation of tools as a prerequisite to obtaining a deduction for the expenses involved. He also construes the second paragraph of his Ruling as spelling out "primary necessity" of vehicular transportation of tools as a prerequisite to obtaining a deduction for the expenses involved. Then respondent takes his position that if you prove "absolute necessity" you cannot have the deduction because "absolute necessity" of paragraph 1 is different than "primary necessity" of paragraph 2 of Rev. Rul. 63-100. Conversely, you cannot have a deduction if you prove "primary necessity" because you then have not proven "absolute necessity". Respondent takes his position that "absolute necessity" is not "primary necessity" and vice versa; that the 2 terms are mutually exclusive and that taxpayer must prove both necessities in order to get the deduction. While this may seem heavy handed, it at least gives meaning to respondent's otherwise ambiguous declaration that petitioner "may" be entitled to a greater deduction.

6. Respondent argues in Item 2 of his brief:

> "The decision here is consistent with the other appellate decisions on the point."

This, of course, is true insofar as the 3 Circuits allow 100% of taxpayer's driving expenses if the taxpayer would not have driven to work but for the necessity of bringing his trade tools with him. But it is not true when we come over to the first question presented by petitioner.

7. Respondent continues:

> "If the Tax Court should determine on remand that petitioner would have driven to work in any event, and consequently rest its decision on an allocation determination, the disposition in this case is indistinguishable from Sullivan v. Commissioner, 368 F. 2d, 1007 (C. A. 2)"

If this really were true, why then did respondent distinguish between the cases? Why was a random and unreasoned one-third of expenses allowed in *Sullivan*? Even if *Sullivan* could be defended by respondent on a basis of less than all the ordinary and necessary expenses, why then did respondent distinguish the instant case by picking a random and unreasoned 50% factor to apply against petitioner's remaining 80% of expenses?

Respondent again has demonstrated the legal chaos which he fosters. How shall the more than 2,000,000 men affected by this case prepare their annual income tax returns? Shall they be guided by the zero percent interpretation of Rev. Rul. 63-100, or by the one-third in *Sullivan*, or by the 50% (or 60%) in *Tyne*, or by the *ALL* in Section 162 (a) of the Internal Revenue Code of 1954, or by the 100% in *Crowther*?

8. The Crowther decision allows ALL (100%) of the expenses of transporting tools. Respondent mis-states his defeat in *Mathews* (which did not involve a question of transporting tools) and manufacturers a truly masterful fiction that *Crowther* turned on whether taxpayer was entitled to deduct "traveling expenses * * * while away from home". This fiction, of course, is not true. *Mathews* said nothing of the sort. The dictum referred to in *Mathews* v. *Commissioner*, 310 F.2d 98, reads:

> "We do not think that our decision in Crowther depended upon the fact that the taxpayer in that case was required to carry his tools into the woods with him."

This dictum (in a case involving no tool transportation) has been twisted completely out of shape by respondent and falsely "interpreted" by use of a magnificently executed non-sequitur by respondent to pretend that *Crowther* did not deal with transportation of tools.

Prentice Hall's authoritative American Federal Tax Reports states the matter clearly in its Headnote 3 in *Crowther*, 4 AFTR 2d 5295:

> "Deduction - Trade or Business Expenses - Transportation of tools
>
> Deduction allowed for costs of transportation of personal tools to log site by employee felling trees and cutting them into logs."

So also is it clear by reading *Crowther* v. *Commissioner*, 269 F. 2d 292, at:

> Page 298: In this case, there was the necessity of traveling back and forth to the "layout" * * * caused * * * by the necessity of carrying tools back and forth to be repaired.
>
> Page 299: The necessity of daily transporting his tools from his layout in the woods, to Fort Bragg, for the purpose of repair or replacement, appears important to us. This was a business necessity, rather than a personal necessity.
>
> Page 299: The operating expenses of the automobile and jeep were "ordinary and necessary expenses paid or incurred . . . in carrying on the trade or business of the taxpayer." We do not believe that they could be called "personal living or family expenses."

100% of Crowther's auto and jeep expenses were allowed to him and the Ninth Circuit rejected the Tax Court's finding that his expenses "are divisible into (1) personal expenses of 'commuting' to his work and (2) business expenses of *transporting tools and equipment used by him in his employment.*"

Conclusion

For all the foregoing reasons, petitioner respectfully prays this Court grant a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

THOMAS J. CARLEY
Attorney for Petitioner
159 Princeton Road
Rockville Centre, N. Y. 11570
516 RO 6-2489

August 1969